

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 31, 2006 Session

JENNIFER LYNN ANDERSON v. MICHAEL E. ANDERSON

**Direct Appeal from the Chancery Court for Maury County
No. 02-657 Stella L. Hargrove, Judge**

No. M2004-01570-COA-R3-CV - Filed on June 9, 2006

In this divorce action, Husband appeals the trial court's calculation of a downward deviation in child support. Wife appeals the trial court's denial of a motion to alter or amend the final divorce decree in order to grant wife an equitable share of a pension plan belonging to Husband. For the reasons set forth below, we affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

John Russell Parkes and Wesley Mack Bryant, Columbia, Tennessee, for the appellant, Michael E. Anderson.

Morgan Andrew Hoover, Pulaski, Tennessee, for the appellee, Jennifer Lynn Anderson.

OPINION

Factual Background and Procedural History

Jennifer Lynn Anderson ("Wife") and Michael E. Anderson ("Husband") were married on June 7, 1991, and subsequently had one child, born October 19, 1992. On October 23, 2002, Wife filed for divorce and Husband soon filed an answer and counter-complaint for divorce. On November 24, 2003, the trial court entered a Final Decree of Divorce finding that the parties had equitably divided the marital assets and liabilities, but reserved any disagreements regarding the establishment of a permanent parenting plan pending a full hearing. Pursuant to Rules 59.04 and 60.02, Wife filed a motion to amend the trial court's order concerning the division of marital

property arguing that in the haste of announcing the property distribution agreement on the day of trial, an additional retirement account belonging to Husband was overlooked.¹

A hearing was held on February 25, 2004, concerning both Wife's motion to alter or amend and a permanent parenting plan for the parties' minor child. On June 14, 2004, the trial court entered an order denying Wife's motion to alter or amend. In its order, the trial court further entered a Permanent Parenting Plan setting Husband's child support obligation at \$562.84 per month. In calculating Husband's child support obligation, the trial court held as follows:

It is the further finding of this court that the Defendant, Mike Anderson, does have some one hundred sixty-seven to one hundred seventy . . . (167-170) days of non custodial parenting time per year and does pick up the child every morning for school and pick up the child from school every afternoon even when Plaintiff has primary parenting time. It is the finding of this court that pursuant to the case of [*Casteel v. Casteel*], 1997 WL 414401 (Tenn. Ct. App.) child support should be computed as follows:

- a. Apply the Father's present earnings the monthly [support guidelines] will be Seven Hundred Thirty-nine Dollars (\$739.00) per month. Multiplying this monthly support by 12 yields child support of Eight Thousand Eight Hundred Sixty-eight Dollars (\$8,868.00) per year.
- b. Dividing Eight Thousand Eight Hundred Sixty-eight Dollars (\$8,868.00) by three hundred sixty-five days (365) yields daily support of Twenty-four Dollars and Thirty Cents (\$24.30).
- c. . . . Father has eighty-seven (87) days of excess visitation. . . .
- d. Eighty-seven (87) excess days multiplied by Twenty-four Dollars and Thirty Cents (\$24.30) per day yields a child support reduction of Two Thousand One Hundred Fourteen Dollars and Ten Cents (\$2,114.10).
- e. Eight Thousand Eight Hundred Sixty-eight Dollars (\$8,868.00) (annual support) minus Two Thousand One Hundred Fourteen Dollars and Ten Cents (\$2,114.10) (annual reduction) yields annual child support of Six Thousand Seven Hundred Fifty-four Dollars (\$6,754.00).

¹In Wife's Motion to Amend Order, she asserts that one retirement account was omitted, but later asserts both an individual retirement plan with a value of \$45,300.00 and a pension plan were omitted. This same ambiguity exists in the facts section of Wife's brief. However, in the argument section of her brief, Wife appears to assert that only one retirement account valued at \$45,300.00 was omitted. As a result, we interpret Wife's argument to mean that only one retirement account valued at \$45,300.00 is at issue in this case.

- f. Six Thousand Seven Hundred Fifty-four Dollars (\$6,754.00) of annualized support divided by twelve (12) yields monthly support of Five Hundred Sixty-two Dollars and Eighty-four Cents (\$562.84).

Both Husband and Wife now appeal.

Issues Presented

On appeal, Husband presents the issue, as restated, of whether the trial court erred in calculating Husband's child support obligation to be \$562.84 by applying *Casteel v. Casteel*, even though the residential sharing schedule adopted by the trial court awarded Husband 167 days of residential parenting time. Wife presents the issue, as restated, of whether the trial court erred by denying Wife's Motion to Alter or Amend the Judgment and grant Wife an equitable share of the Husband's omitted pension.

Standard of Review

In matters heard by a trial judge sitting without a jury, our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness. Tenn. R. App. P. 13(d) (2004). We will not reverse the trial court's factual findings unless the evidence in the record preponderates against those findings. *Jahn v. Jahn*, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996). A trial court's conclusions on questions of law are reviewed *de novo*, but without any presumption of correctness. *Id.* (citing *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993)).

Analysis

Calculation of Child Support Deviation

In his brief, Husband asserts that the trial court erred in applying child support reduction formula adopted by this Court in *Casteel v. Casteel*, No. 03A01-9703-CV-00073, 1997 WL 414401 (Tenn. Ct. App. July 24, 1997) *perm. app. denied* (Tenn. Mar. 2, 1998). Specifically, Husband argues that the formula adopted in *Casteel* is inequitable and argues that this Court should abrogate *Casteel* in favor of another child support reduction formula adopted by this Court in *Morgan v. Morgan*, No. 03A01-9705-CV-00166, 1997 WL 672063 (Tenn. Ct. App. Oct. 30, 1997)(*no perm. app. filed*). We disagree.

This case was decided under the Child Support Guidelines in effect prior to the implementation of the current "income shares" method adopted by the Tennessee Legislature in 2005. As a result, in deciding this case, we look to the guidelines in effect at the time the trial court rendered its decision in February 2004. Under these guidelines,

the child support award is based on a flat percentage of the obligor's net income . . . depending on the number of children for whom support is being set in the instant case. While the income of the obligee should not be considered in the calculation of or as a reason for deviation from the guidelines in determining the support award amount, the formula presumes that the obligee will be expending at least an equal percentage of net income as that of the obligor for the support of the children for whom support is sought.

Tenn. Comp. R. & Regs. 1240-2-4-.03(2) (2004).

The 2004 guidelines were “based on the assumption that the primary custodial parent has custody for approximately 285 days per year with ‘co-parenting time’ granted to the non-custodial parent for the remaining 80 days.” *Morgan*, 1997 WL 672063, at *2; Tenn. Comp. R. & Regs. 1240-2-4-.02(6) (2004). However, “[i]n situations where overnight time is divided more equally between the parents, the courts will have to make a case-by-case determination as to the appropriate amount of support.” Tenn. Comp. R. & Regs. 1240-2-4.02(6) (2004). Specifically, the guidelines provide that

Deviation from the guidelines may be appropriate . . . :

. . . .

(b) In cases where physical custody of the child(ren) is more equally divided between the parties than occurs in a situation where one party has an average amount of overnight visitation as defined in 1240-2-4.02(6).

Tenn. Comp. R. & Regs. 1240-2-4.04(2) (2004).

Although the guidelines provide for a potential downward deviation in child support when an obligor parent spends significantly more than the presumed 80 days of visitation with the child, the guidelines do not provide guidance in calculating the amount of such a deviation. As a result, courts have devised different methodologies in determining such deviations. Two such methodologies were set forth by this Court in *Casteel v Casteel* and in *Morgan v. Morgan*. In *Casteel*, the mother had custody of the children 234 days per year while the father had custody for 131 days per year. *Casteel*, 1997 WL 414401, at *1. Under the guidelines, with no deviation, Father's child support obligation was assessed at \$740 per month. *Id.* at *3. Based upon the facts on appeal, this Court held that Father was entitled to a downward deviation in child support payments and calculated such deviation as follows:

(1) determine the annual amount of support under the Guidelines:

\$740.00 per month X 12 months = \$8,880.00, or \$24.33 per day

(2) determine what proportion of that annual amount is attributable to the increased visitation, any amount over 80 days per year being considered excess:

51 days excess [at] \$24.33 per day = \$1,240.83 per year, or \$103.40 per month

(3) reduce the Guideline amount by the amount attributable to increased visitation:

\$740.00 [per month] - \$103.00 [per month] = \$637.00 [per month]

Id. at *3.

In *Morgan v. Morgan*, “the mother had custody of the children for an average of 203.5 days per year, and the father had custody for 161.5 days per year.” *Morgan*, 1997 WL 672063, at *1. At trial, the referee held that:

A variance from the Child Support Guidelines is in order in that [father] has residential custody of the children for a period of time each year and that he has physical possession of the children over twice the number of days per year anticipated by the guidelines, that the amount of child support ordered should be one-half (½) the guidelines amount . . . [.]

Id. at *1. The circuit court subsequently adopted the referee’s findings and held that father’s child support should be reduced by half. *Id.* at *1. On appeal, this Court affirmed the method of calculating father’s downward deviation adopted by the referee and circuit court, noting that in cases where visitation was more evenly divided, courts must make a case-by-case determination as to the amount of child support to be paid. *Id.* at *2. In a footnote, this Court further noted

that no standardized method of calculation has been established for calculating downward deviation from the child support guidelines. Consideration of deviation on a “case by case” basis would seem to make a standardized method difficult. For another approach, *see Casteel v[.] Casteel*, [1997] WL 414401, an opinion of this court, authored by Senior Judge William Inman, filed at Knoxville, July 24, 1997.

Id. at *2, n. 2.

As previously noted, the court in the present case applied the formula promulgated in *Casteel* in determining Father’s downward deviation in child support. Father asserts that the formula proffered in *Casteel* is inequitable and argues that this Court should instead apply the formula set forth under *Morgan*. We disagree. We find the formula in *Casteel* equitable in that it breaks down a obligor parent’s yearly obligation into a per-day amount and then awards a deviation by multiplying the per-day amount with the number of days of excess visitation undertaken by the obligor parent. This formula has also been followed by this Court in several

cases in order to determine both upward and downward deviations in child support. *See Burke v. Burke*, No. M2000-01111-COA-R3-CV, 2001 WL 921770, at *6 (Tenn. Ct. App. Aug. 7, 2001) (*no perm. app. filed*); *Chambers v. Amonette*, No. M1999-01254-COA-R3-CV, 2000 WL 1367956, at *4 (Tenn. Ct. App. Sept. 22, 2000) (*no perm. app. filed*); *Hansen v. Hansen*, No. E1999-02666-COA-R3-CV, 2000 WL 486808, at *4-5 (Tenn. Ct. App. Apr. 26, 2000) (*no perm. app. filed*). After a review of the record, we find no error in the trial court's application of *Casteel* in this case. Accordingly, we affirm.

Division of Retirement

On appeal, Wife argues that the trial court erroneously denied her relief under Rules 59.04 and 60.02² of the Tennessee Rules of Civil Procedure when it denied her motion to alter or amend seeking the division of a retirement account belonging to Husband which Wife contends was “simply overlooked in making the announcement to the court of the [property distribution] agreement reached shortly before trial.” The decision of whether to grant or deny either a motion to alter or amend a judgment under Rule 59.04 or a motion for relief from a judgment under Rule 60.02 lies within the sound discretion of the trial court. *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993); *Watson v. Clark*, No. M2003-02398-COA-R3-CV, 2005 WL 856083, at *2 (Tenn. Ct. App. Apr. 13, 2005) *perm. app. denied* (Tenn. Oct. 24, 2005). Appellate review of a motion for relief under Rules 59.04 or 60.02 is to determine whether the trial court abused its discretion. *Underworld*, 854 S.W.2d at 97; *Watson*, 2005 WL 856083, at *2. An abuse of discretion occurs when a trial court “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citation omitted).

In urging us to reverse the trial court, Wife first asserts that the trial court erred in refusing to alter or amend its order under Rules 59.04 or grant relief pursuant to 60.02(5) because the denial to Wife of an equitable share of the retirement account at issue results “in clear

²Rule 60.02 provides that

[o]n motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason a justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02 (2005). In her brief, Wife does not distinguish the subsections of Rule 60.02 under which she seeks relief. However, based upon her pleadings, it appears to this Court that she is seeking relief under subsection (1) for mistake or excusable neglect, and under subsection (5) for the alleged inequitable result which Wife alleges will occur if the judgment in this case is not vacated or amended. Wife has asserted no claim that Husband is guilty of fraud or other misconduct, nor has Wife asserted that the judgment is void or that the judgment has been satisfied, released, or otherwise vacated. As a result, we will address Wife's claims under Rule 60.02 in light of subsections one and five.

inequity in this case.” We find Wife’s argument unpersuasive. As set forth by the trial court in the parties’ divorce decree, it appears that Wife received half of the value of the marital home (\$140,000), as well as an equitable portion of the parties’ remaining non-retirement assets. In relation to retirement assets, the trial court held as follows:

8. It is the finding of this Court that the agreement of the parties that as of January, 1, 2003, [Husband] had an Individual Savings Plan with the Saturn Corporation with a balance of [\$72,457.02]. It is the further finding of this Court and the agreement of the parties that as of the first day of January, 2003, [Wife] had a 403(b) account through her employer, Maury Regional Hospital[,] with an approximate outstanding balance of [\$40,000.00]. It is Ordered, Adjudged and Decreed that a Qualified Domestic Relations Order will be entered whereby [\$30,000.00] will be transferred from the Individual Savings Plan of [Husband] rolled over into the name of [Wife]. All remaining portions of the Individual Savings Plan of [Husband] shall become the sole and separate property of [Husband]. All right, title and interest of the 403(b) account of [Wife] shall become the sole and separate property of [Wife].

9. The parties each have an additional retirement and/or pension plan. All right, title and interest in Wife’s AIG account through her employer shall become her sole and separate property and all right, title and interest in [Husband’s] pension plan shall become his sole and separate property.

In denying Wife’s motion to amend, the trial court held as follows:

It is the finding of this Court that [Wife’s] Motion should be denied. It is the finding of this Court that the Order entered in this action accurately reflects the distribution of assets. This court also finds that there were good lawyers involved in this case with discovery having been completed. The court has been able to judge the credibility of the parties and the court finds that there was full disclosure of all assets. The court finds that [Wife] has not carried the burden of establishing any entitlement to relief and thus the distribution of assets and liabilities as set forth in the previous order of this court shall remain.

Based upon the text quoted above, it is clear that Husband received \$42,457.02 in his Individual Savings Plan while Wife received her total balance of \$40,000 in her 403(b) account as well as an additional \$30,000 rolled over from Husband’s Individual Savings Plan (for a grand total of \$70,000). It is also clear that the trial court awarded each party the remaining interest in their respective retirement plans funded through their employers. According to the trial court’s order denying Wife’s motion to alter or amend, the retirement awarded solely to Husband included the pension plan at issue in this case. Although Wife asserts that Husband’s receipt of the entire disputed pension plan results in a clear inequity to Wife, the record contains no evidence showing the total value of retirement and assets received respectively by Wife and

Husband in this divorce proceeding.³ Based upon the record before this Court, we find no evidence showing that Wife will suffer an inequity due to the trial court's denial of relief under Rules 59.04 or 60.02(5). As a result, we further find that the trial court did not abuse its discretion in denying Wife's motion on these grounds.

Wife next appears to argue that the trial court erred in granting her relief under Rule 60.02(1) due to mistake or excusable neglect. Specifically, Wife appears to assert that excusable neglect occurred when the disputed retirement account was "simply overlooked" by her counsel in announcing the property disposition agreement to the trial court. We disagree. While Rule 60.02 does allow relief from a judgment due to excusable neglect, the Tennessee Supreme Court has previously recognized that mere carelessness or forgetfulness does not constitute such neglect. *Food Lion, Inc. v. Washington County Beer Bd.*, 700 S.W.2d 893, 896 (Tenn. 1985). As a result, we find no excusable neglect or mistake in this case. However, even if excusable neglect or mistake were found, this Court has previously held that

[r]ule 60.02 is not "a mechanism for use by a party who is merely dissatisfied with the result of a particular case." *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991).

[Rather,] [t]he rule "acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990).

Day v. Day, No. M2001-01624-COA-R9-CV, 2002 WL 13036, at *3-4 (Tenn. Ct. App. Jan. 4, 2002)(*no perm. app. filed*). Since we have already found that the record contains no facts showing that Wife will be subjected to an inequity resulting from the trial court's denial of her motion, we find no abuse of discretion in denying relief under Rule 60.01(1) in this case.

Conclusion

For the foregoing reasons, we affirm the trial court on all claims asserted by the parties in this appeal. Costs of this appeal are hereby split and awarded respectively against Appellant, Michael Anderson, and his surety, and Appellee, Jennifer Lynn Anderson, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

³The parties in this case entered into a property settlement agreement which was subsequently announced to the trial court on November 24, 2003. No copy of this agreement is contained in the record. Furthermore, while the Decree of Divorce and Distribution of Assets and Liabilities includes a description of the property settlement in this case, it does not list out values of the property received by Wife and Husband.